

Exhibit A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

)
) MDL No. 1456
)

) CIVIL ACTION: 01-CV-12257-PBS
)

THIS DOCUMENT RELATES TO
01-CV-12257-PBS AND 01-CV-339

) Judge Patti B. Saris
)

) Chief Magistrate Judge Marianne B. Bowler
)

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF OBJECTIONS TO ORDER
DENYING MOTION TO COMPEL DEFENDANTS' CORRESPONDENCE
WITH PUTATIVE CLASS MEMBERS**

In their opposition to Plaintiffs' objections and motion, Defendants:

- Do not cite a single case holding that their litigation-related communications with putative class members are protected from discovery.
- Do not cite any policy reasons supporting why these highly relevant communications should be cloaked.
- Fail to acknowledge Plaintiffs' argument that the communications are relevant because Plaintiffs are entitled to review these communications to determine what documents are being made available to Defendants in response to the subpoenas, and what documents Defendants decided not to select and copy, as well as to determine what Defendants are telling these class members about the case and what they intend to cover in depositions, among other things.

- Do not make any argument that producing this material will be burdensome (because it will not be).

Defendants can only cite to a ruling that was never made, as the Court did not address Defendants' correspondence with putative class members when the Court ruled that at least some discovery of these class members could move forward. While Defendants admit that the Court's April 26, 2004, Order denied the motion "for the reasons stated in open Court" (*see* Defs. Mem. at 2), Defendants fail to address the ***undeniable fact*** that the transcript from the March 8th hearing plainly demonstrates that, at that hearing, correspondence with class members was ***never*** discussed by anyone – not Plaintiffs, Defendants or the Court. Thus, Plaintiffs are not seeking to "relitigate the issue," as Defendants charge. (Defs. Mem. at 2). Plaintiffs respectfully submit that, because the Court never ruled on this issue, there is nothing to relitigate.

Defendants attempt to distinguish Plaintiffs' persuasive supporting cases by asserting that the opinions either concerned class discovery generally or involved situations where defendants engaged in improper communications. (Defs. Mem. at 3.) But this is a distinction without a difference, as these authorities demonstrate that a defendant's litigation-related communications with putative class members should be disclosed ***as a matter of course*** in order to protect the integrity of the proceedings. Plaintiffs have not located any case holding otherwise; nor have Defendants.

Finally, Defendants claim that they are not engaging in any wrongdoing. (Defs. Mem. at 4.) Yet, they continue to refuse to produce this material. Because the communications at issue are relevant, not protected from disclosure and not burdensome to produce, Defendants' failure to produce – coupled with the lengths they have gone to fight such a production – raises a significant red flag.

The information sought is plainly relevant, and producing it will not in any way impede Defendants' discovery efforts or cause any undue burden. For the reasons set forth above and in Plaintiffs' opening memorandum, the Court should sustain Plaintiffs' objection to the Chief Magistrate Order and grant Plaintiffs' Motion to Compel.

DATED: November 30, 2004.

By /s/ Steve W. Berman

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION TO ORDER DENYING MOTION TO COMPEL DEFENDANTS' CORRESPONDENCE WITH PUTATIVE CLASS MEMBERS** to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on November 30, 2004, a copy to Verilaw Technologies for Posting and notification to all parties

By /s/ Steve W. Berman

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